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CURRENT DEVELOPMENTS

German Genocide in Namibia before U.S. Courts

Ovaherero and Nama sue Germany over Colonial Injustices – Again

ANDREAS BUSER — 11 January, 2017

Since October 2016, the German Historical Museum has been dealing with the past and presence of German colonialism in a special exhibition (see here) – for the first time ever. But German colonialism is not only a dusty artefact exposed in some German museum. Instead, it continues to haunt the German State in the form of claims for reparations by the descendants of the victims of colonial injustices. While German State representatives are busy negotiating the reconciliation process with the Namibian government,

representatives of the Ovaherero and Nama have filed a class action complaint against the Federal Republic of Germany at the United States District Court, Southern District of New York (see press release of January 5, 2017). While both, the facts of the case and in depth legal analyses have been elaborated elsewhere (see e.g. here, here and here, see also the comments on this blog here, here and here), the following will provide a short summary of the (international) legal aspects of this new class action complaint and some initial thoughts on its legal persuasiveness.

The Story So Far

The new lawsuit is not the first one filed by representatives of Herero and Nama against the Federal Republic of Germany. Already in 2001, several Herero organizations sued Germany for the genocide of 1904-1908. The class action was based on the Alien Torts Claims Act and claimed compensation for "crimes against humanity" and "violations of fundamental principles of international law" including genocide, slavery, forced labor and systematic abuse of women. Yet, Germany rejected to accept the service of the action under Art. 13 of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters with reference to sovereign State immunity. This non-acceptance presumably led the plaintiffs in 2003 to abandon the action.

Since this initial claim, Germany's approach on the subject has changed, at least rhetorically. Beginning in 2012, Germany and Namibia have engaged in intense negotiations regarding reconciliation. Most importantly, since 2015 German officials have repeatedly characterized the actions against the Herero and Nama as "genocide" and "war crimes"

(see here). Yet, the German government also stressed that the term was used in a historical non-legal sense and that the historical events could not legally be qualified as genocide (at that time) and therefore could not entail any legal consequences (see press report here).

The New Class Action Complaint

The new lawsuit was brought to the court by representatives of the Ovaherero and Nama people on behalf of themselves and all other Ovaherero and Nama indigenous peoples. The plaintiffs are represented by Mc.Callion & Asssociates LLP, which is known for its high-profile class action lawsuits and the representation of thousands of World War II victims in their successful settlement claims against the German government and German industries. The new action is brought primarily under the Alien Tort Claims act but also under common law and New York state law.

The Plaintiffs essentially claim two things. First, they seek reparations for damages resulting from "genocide and unlawful taking of property in violation of international law by the German colonial authorities during the 1885 to 1909 period". Second, the plaintiffs claim that their exclusion from negotiations between Germany and Namibia regarding the subject matter of the complaint violates the "plaintiffs' rights under international law, including the U.N. Declaration on the Rights of Indigenous People to self-determination for all indigenous peoples and their right to participate and speak for themselves regarding all matters relating to the losses that they have suffered."

The plaintiffs regard this exclusion as a violation of Art. 18 UN Declaration on the Rights of Indigenous Peoples (UN Declaration), which provides indigenous peoples the right to

participate in decision-making in matters which would affect their rights. Plaintiffs also refer to Art. 11 (2) of the UN Declaration, which provides for redress in cases of infringement of cultural, intellectual, religious and spiritual property. What is missing here is an inquiry into the legal nature of those alleged rights. As UN resolutions are non-binding as such, some arguments on the customary or other legal quality of those rights would have made this argument more persuasive.

Legally speaking, the further arguments made by the plaintiffs regarding genocide also appear rather thin: Important legal questions, e.g. the retroactive applicability of the Genocide convention, the customary law status of legal prohibitions in 1904-1908, the status of the territory at that time and many more have not been sufficiently addressed, if at all.

Moreover, the important procedural obstacle of sovereign jurisdictional immunity is only addressed very briefly (para. 15-17). The plaintiffs mainly seem to rely on the expropriation exception (28 U.S.C. § 1605(a)(3)) in the Foreign Sovereign Immunity Act (FSIA). They basically argue that the takings of property (cattle etc.) did not only "effectuate genocide or serve as means of carrying out genocide" but "[r]ather, the expropriations were themselves genocide" and therefore "plaintiffs' property-based claims fall squarely within the FSIA's expropriation exception."

From an international law perspective, it appears rather clear that sovereign jurisdictional immunity prevails in the case at hand. The International Court of Justice (ICJ) upheld jurisdictional immunity only a few years ago, and found that Italian courts were wrong ignoring the state immunity of

Germany when confronted with claims against the German State by victims of Nazi war crimes (ICJ Jurisdictional Immunities of the State judgement).

Responses by Germany so far

In a regular press conference last Friday (6th January), a German Foreign Ministry spokesman, confirmed that the representatives of the victims had intentionally been excluded from negotiations and that there are "good reasons for it". He also indicated that this exclusion was part of an agreement between Namibia and Germany and stressed that the exclusion is of particular importance to the Namibian side. He then highlighted existing development aid to Namibia and indicated that further reconciliation negotiations could involve additional financial payments. Finally, he confirmed upon request by journalists that the German government keeps with the usage of the term "Genocide".

Conclusion

All in all, the new lawsuit is viable for bringing several flaws of ongoing negotiations between Germany and Namibia to public attention. The non-participation of descendants of victims' groups indeed appears questionable. Yet, the exclusion might be due to preferences by the Namibian government rather than bad intention by the German side. Bearing in mind that the ICJ upheld jurisdictional immunity in the Jurisdictional Immunities judgement and the rather thin arguments on the subject in the complaint, the chances of legal success in court remain low.

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